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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

—v.—

FRANK M. DYSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

—v.—

FRANK M. DYSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Tom E. Ellis and Robert D. Love, petition for writ of certiorari to review the *per curiam* affirmance by the Court of Appeals for the Fifth Circuit of the District Court decision dismissing the complaint for failure to state a claim for relief, without reaching the plaintiffs' motion for summary judgment or defendants' motion for abstention.

Opinions Below

The opinions of the United States District Court for the Northern District of Texas, Dallas Division, and the United States Court of Appeals for the Fifth Circuit, are not yet reported. They are set out in the Appendix, *infra*, pp. 1a, 2a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 16, 1973. Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Must petitioners show bad faith, harassment or other extraordinary circumstances required by *Younger* v. *Harris*, 401 U.S. 37 (1971), when they seek federal declaratory relief from a facially unconstitutional ordinance, and when they have been once convicted under such ordinance and no municipal or state proceedings are pending?

2. Under the circumstances described in Question No. 1, and when in addition the petitioners, prior to conviction, have sought a writ of prohibition to the State's highest court, and the writ has been denied, must petitioners exhaust other state remedies prior to obtaining federal declaratory relief?

Constitutional Provisions and Statutes

Section 31-60 of 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance No. 12991 is set out in the Appendix, *infra*, pp. 8a-10a.

Statement of the Case

The Petitioners, convicted under the City of Dallas Loitering Ordinance, seek to declare that ordinance unconstitutional on its face because it violates the due process clause, the equal protection clause, and the first amendment to the United States Constitution. As ancillary relief Petitioners requested the District Court to declare their arrests and convictions void and to declare that Petitioners are entitled to state that they have never been arrested or convicted under that ordinance. Petitioners also sought an injunction ordering the Respondents to expunge all references to the arrests and convictions of the Petitioners under the ordinance in question but Petitioners did not seek an injunction against future enforcement.

The ordinance in dispute provides in part:

> It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well-being of persons or for the security of property, in the surrounding area.

The ordinance also defines loitering to include the following activities:

> The walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; the idle spending of time; delaying; sauntering and moving slowing about, where such conduct is not due to physical defects or conditions.

On January 18, 1972, Petitioners, while driving a car, were arrested and charged with violating the loitering ordinance. Prior to trial in the Dallas Municipal Court, Petitioners applied to the Texas Court of Criminal Appeals for a Writ of Prohibition to prevent their prosecution under the ordinance on the grounds that the ordinance was facially unconstitutional (App. 21).* On February 21, 1972, the Texas Court of Criminal Appeals denied Petitioners' application for Writ of Prohibition without written opinion.

When Petitioners' cases were set for trial in the Municipal Court of the City of Dallas, they moved to dismiss on the grounds that the ordinance was violative of the United States Constitution. These motions were denied, whereupon Petitioners entered pleas of nolo contendere. They were convicted, fined and the fines were paid.

Following their convictions in the Municipal Court of the City of Dallas, Petitioners filed their complaint in the United States District Court for the Northern District of Texas, Dallas Division, seeking a declaratory judgment that the ordinance was unconstitutional and ancillary relief. Though state appellate processes were available, Petitioners presented affidavits to show state remedies were not adequate to reach the question of the ordinance's constitutionality. A statistical study of the loitering ordinance prosecutions in Dallas indicated that with an average of forty to fifty cases a month:

> "... a substantial number of the cases filed each month were dismissed or quashed prior to trial on the merits. ... of those quashed or dismissed practically all involved defendants who had pleaded *not* guilty and who were represented by counsel; conversely none of the dismissed or quashed cases involved a defendant who was *not* represented by counsel regardless of the plea entered" (App. 32-33).

* The designation "App." refers to the Appendix filed in the United States Court of Appeals for the Fifth Circuit in this case.

Affidavits of three attorneys also described a pattern of illegal arrests and acquittals in the Municipal Court, and that upon appeals and trials de novo in the Dallas County Court of Criminal Appeals, the complaints were quashed with the result that the County Court did not reach the constitutional questions (App. 26-33). Subsequent federal court interrogatories filed under Rule 33 revealed that arrests continued to be made on an average of more than two a day under the loitering ordinance (App. 55).

Without ruling upon the petitioners' motion for summary judgment and the sufficiency of the attached affidavits and interrogatories, the United States District Court for the Northern District of Texas dismissed the complaint for failure to state a claim for relief. The Fifth Circuit affirmed the District Court's decision in a *per curiam* opinion.

Reasons for Granting the Writ

The opinion in *Younger* v. *Harris*, 401 U.S. 37 (1971), spoke only to the propriety of federal declaratory or injunctive relief when state criminal proceedings are pending. *Samuels* v. *Mackell*, 401 U.S. 66 (1971), expressly reserved for future decisions the propriety of federal declaratory or injunctive relief when no state prosecutions are pending. Subsequent decisions by this Court appear to

have decided the question. Mr. Justice Brennan, in *Lake Carriers' Ass'n* v. *MacMullan,* 406 U.S. 498, 509 (1972), stated that declaratory relief may be appropriate absent pending state actions. In *Doe* v. *Bolton,* 410 U.S. 179, 188 (1973), the Court confirmed the standing of a physician, threatened with prosecution, to obtain federal declaratory and injunctive relief against the Georgia abortion statute; simultaneously the Court denied federal relief to a Texas physician against whom state criminal proceedings were then pending. *Roe* v. *Wade,* 410 U.S. 113, 126 (1973). See also *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92 (1972). These decisions should settle the principle that federal declaratory relief is available to challenge state criminal laws if no prosecution is then pending against the plaintiff. The First, Second, Third and Ninth Circuits agree with this principle. *Wulp* v. *Corcoran,* 454 F.2d 826 (1st Cir. 1972); *Thoms* v. *Heffernan,* 473 F.2d 478 (2d Cir. 1973); *Lewis* v. *Kugler,* 446 F.2d 1343 (3d Cir. 1971); *Anderson* v. *Nemetz,* 474 F.2d 814 (9th Cir. 1973). The Fifth Circuit disagrees. *Becker* v. *Thompson,* 459 F.2d 919 (5th Cir. 1972), rehearing en banc den., 463 F.2d 1338 (1972), cert. granted sub nom. *Steffel* v. *Thompson,* 41 U.S. L.W. 3462 (U.S. Feb. 27, 1973) (No. 72-5581). The instant case was dismissed by the District Court and affirmed by the Fifth Circuit on the authority of *Becker* v. *Thompson, supra.* Accordingly, certiorari should also be granted in this case. See *Jones* v. *Wade,* Civil No. 72-1481 (5th Cir. May 30, 1973) (distinguishing *Becker* on grounds applicable to the instant case).

I.

Petitioners need not show bad faith, harassment, or other extraordinary circumstances required by *Younger* v. *Harris* when they seek federal declaratory relief from a facially unconstitutional municipal ordinance, and when they have been once convicted under such ordinance and no municipal or state proceedings are pending.

A. *No Pending Prosecutions.*

The principles of equity, comity, and federalism for which *Younger* v. *Harris* and its companion cases stand, apply with diminished force when no state prosecutions are pending against applicants for federal relief from a facially unconstitutional state law. *Lake Carriers' Ass'n* v. *MacMullan, supra* at 509; *Perez* v. *Ledesma,* 401 U.S. 82, 93 (1971) (Brennan, White, and Marshall, JJ., dissenting). See also *Wulp* v. *Corcoran,* 454 F.2d 826, 831-32 (1st Cir. 1972); *Thoms* v. *Heffernan,* 473 F.2d 478, 483 (2d Cir. 1973); *Lewis* v. *Kugler,* 446 F.2d 1343, 1347-49 (3d Cir. 1971); *Jones* v. *Wade,* Civil No. 72-1481 (5th Cir. May 30, 1973); *Becker* v. *Thompson,* 459 F.2d 919, 923-26 (5th Cir. 1972) (Tuttle, J., concurring), *rehearing en banc denied,* 463 F.2d 1338, 1339-40 (Brown, Wisdom, Goldberg, JJ., dissenting); *Anderson* v. *Nemetz,* 474 F.2d 814, 819-20 (9th Cir. 1973). When a state prosecution is pending, federal relief can at worst result in duplication of effort and lost time, but more significantly, federal intervention in such a context may reflect a "lack of confidence by federal courts in the capacity or the willingness of state courts to vindicate federal constitutional rights." *Wulp* v. *Corcoran, supra*

at 831. However, a healthy respect for the states and their systems of judicial administration does not require deference to state courts when, as here, such courts have refused to rule on constitutional issues. See *Hull* v. *Petrillo,* 439 F.2d 1184, 1188 (2d Cir. 1971). This is true regardless of whether the state simply threatens prosecution without actually bringing charges, or whether after convictions are obtained (without consideration of constitutional defenses), charges are uniformly dismissed so as to preclude resolution of the constitutional doubts with regard to the questioned ordinance.

Thus, whether Petitioners herein are considered as applicants for federal relief against threatened prosecutions, or whether they are treated as persons who have urged their constitutional defenses to no avail in state court, it remains a fact that at all federally relevant times no city or state proceedings were in progress against Petitioners, and that notions of comity and federalism do not preclude appropriate federal relief.

B. *Declaratory Relief.*

Petitioners have sought declaratory relief, not injunctive relief against future enforcement. Just as the *Younger* v. *Harris* limitations upon the availability of federal relief do not apply where there are no pending state prosecutions, so also are they less potent when declaratory rather than injunctive relief is sought. See cases cited in subsection A above. One principle of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), which emerged unscathed after *Younger* is that a person need not test his constitutional defenses in state court before seeking federal relief if (1) no state prosecution is pending, and (2) if the state criminal statute

in question is facially unconstitutional. See the concurring opinion of Judge Tuttle in *Becker* v. *Thompson,* 459 F.2d at 923-26. *Younger* taught that federal injunctive relief is proper even though a state prosecution is pending, if and only if there is bad faith or harassing enforcement of the state statute or other extraordinary circumstances. But neither *Younger* nor its companion cases, including *Samuels* v. *Mackell,* 401 U.S. 66 (1971), purport to limit *Dombrowski's* principle in contexts in which no state prosecution is pending. While Mr. Justice Black in *Samuels* indicated that injunctive and declaratory relief would ordinarily have the same effect upon the states, his statement was expressly confined to pending-prosecution situations. *Samuels* v. *Mackell, supra* at 73.

Without conceding that injunctive relief under *Dombrowski* would not have been available to Petitioners had such relief been prayed for, it is clear that under *Zwickler* v. *Koota,* 389 U.S. 241 (1967), the district court had a duty to consider the propriety of declaratory relief independently of *Younger's* limitations on injunctive relief. The considerations that would have guided the district court are those pertinent to relief under the Declaratory Judgment Act of 1934, 28 U.S.C. §2201. The Act was passed to provide federal courts with a milder alternative to the injunction and to enable persons to test the constitutionality of a criminal statute or ordinance without having to violate it or else forego the exercise of their rights in fear of prosecution. As Mr. Justice Brennan stated in his dissent in *Perez* v. *Ledesma, supra* at 116-17, Congress rejected any attempt to condition the grant of declaratory relief upon the presence of circumstances justifying injunctive relief. Under the Declaratory Judgment Act, the

availability of an alternative adequate remedy at law will not defeat relief; nor is irreparable injury a prerequisite to declaratory relief. See *Katzenbach* v. *McClung*, 379 U.S. 294-96 (1964); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937).

Neither *Dombrowski* nor *Zwickler* were overruled by this Court in *Younger* and its companion cases; only lower court holdings extending their principles to pending-prosecution cases were disapproved. The case at bar stands as an example of the wisdom of this Court in preserving such principles.

II.

When petitioners, prior to conviction, have sought a writ of prohibition to the state's highest court, and the writ has been denied, petitioners need not exhaust other state remedies prior to obtaining federal declaratory relief.

A. *Exhaustion Is Not Required.*

Monroe v. *Pape*, 365 U.S. 167 (1961), indicated that because the federal remedies provided by the Civil Rights Act are intended to be supplementary to any state remedy that might be available to redress unconstitutional action under color of state law, a plaintiff need not exhaust state judicial remedies before suing under the Act. See *Gibson* v. *Berryhill*, 93 S. Ct. 1689 (1973). *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), *King* v. *Smith*, 392 U.S. 309 (1968), and *Houghton* v. *Shafer*, 392 U.S. 639 (1968), support the same principle that a federal plaintiff need not exhaust state administrative remedies. While it is true that *Monroe* v.

Pape was an action for damages, whereas the case at bar is one for declaratory relief, and that each of the cited cases turned on their facts, the instant case is one which should not require exhaustion of state judicial remedies. First, the ordinance is patently unconstitutional on its face and thus results in a pattern of illegal police practices. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1964); cf. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1959). Second, the challenged law is a Dallas City ordinance, not a Texas state statute, and invalidation would not paralyze the City. Third, the Texas state judicial remedies in the case of conviction in the Municipal Court are appeal, bond, and trial de novo, and in the event of fine in excess of $100, a second appeal. Tex. Code Crim. Proc., arts. 4.03, 44.13, 44.16, 44.17 (1965). Realistically, legal expenses nullify the theoretical adequacy of relief.

Further, this action is a civil action for declaratory relief under the Civil Rights Act, not a petition for habeas corpus. Since petitioners have paid their fines, are not in custody, and are not under suspended sentences or control, habeas corpus and its requirement for exhaustion, would not be applicable. See, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *North Carolina* v. *Rice*, 404 U.S. 244 (1971).

B. *Reasonable Exhaustion Is Satisfied by a Writ of Prohibition.*

Even assuming that some requirement of exhaustion should be applied against Petitioners, they have satisfied it. Prior to trial in the Dallas Municipal Court, Petitioners

sought a writ of prohibition in the Texas Court of Criminal Appeals, specifically challenging the ordinance on the same federal constitutional grounds which were later raised in the declaratory judgment complaint in the federal district court. The Texas Court of Criminal Appeals denied the writ when it had power to issue it. Art. 5, §5, TEXAS CONSTITUTION; see *State ex rel. Bergeron* v. *Travis County Court,* 174 S.W. 365 (Tex. Crim. App. 1915) (application heard but denied). Since the only ground Petitioners have ever raised is facial unconstitutionality of the ordinance, it is unduly burdensome to undergo trial de novo and later appeal to the court which has already denied the writ. No legitimate purpose of exhaustion, abstention, comity or federalism is served by requiring more. The highest court of the state has been given an opportunity to rule on the matter and has declined. In maintaining the delicate balance of federalism, due respect has been paid in this case to state interests.

C. *Requirement of Further Exhaustion Allows the State System to Moot Federal Constitutional Rights and Leaves Petitioners Without an Adequate Remedy.*

The *Papachristou* decision shows that the arrest under an unconstitutional vagrancy ordinance is at the heart of the violation of constitutional rights. The arrest is a police device for investigation and the conviction is secondary to police purposes. See Foote, *Vagrancy-Type Law and Its Administration,* 104 U. PA. L. REV. 603 (1956). Even if convictions are continually invalidated on technical grounds, the arrests continue and serve a police function. The same is true in this case under the Dallas loitering ordinance. Petitioners here were arrested while driving in their automobile at about midnight. The factual material presented to the District Court in affidavits and interrogatories attached to the motion for summary judgment (App. 26-33), suggests a pattern in which a person charged with violating an unconstitutional loitering ordinance admittedly has a remedy in the state court system, in the sense that if he obtains a lawyer, appeals, and asks for a trial de novo, he will probably get the conviction reversed, either by failure of the City to prosecute, or by the action of County Court of Criminal Appeals in quashing the criminal complaint. However, the person clearly has no adequate remedy under state law in the practical sense that he is not protected against re-arrest under an unconstitutional ordinance and is deprived of a federal constitutional right to move about freely in the City of Dallas. See *Jones* v. *Wade,* Civil No. 72-1481 (5th Cir., May 30, 1973) at p. 10, citing *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 3, at 307 (1971). These facts were before the District Court in affidavits on a motion for summary judgment; yet that court dismissed the complaint for failure to state a claim for relief, thereby leaving the Petitioners without an adequate remedy to protect their rights, and leaving the state system to continue frustration of those rights.

D. *Superior Judicial Administration Requires a Remedy in the United States District Court.*

If the federal plaintiffs have no right to a remedy in this case, among their possible state remedies are the following: (1) Seek a pre-trial writ of prohibition in the Texas Court of Criminal Appeals (which the Petitioners did) and upon its denial, appeal to the United States Supreme Court. Under 28 U.S.C. §1257, the decision would be a final decision of the highest court in which a decision could be

had and the United States Supreme Court can then take jurisdiction to invalidate the ordinance. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

(2) The person can appeal to the Dallas County Court of Criminal Appeals, and after posting bond of double the fine plus costs, can obtain a trial de novo. TEX. CODE CRIM. PROC. arts. 44.13, 44.16, 44.17 (1965). If he is fined in excess of $100, he can then appeal to the Texas Court of Criminal Appeals, TEX. CRIM. PROC. art. 4.03 (1965), and if the decision is affirmed, he can then appeal to the United States Supreme Court.

(3) If in the Dallas County Court of Criminal Appeals upon trial de novo, he is fined $100.00 or less, he has no further appeal in the state system. TEX. CODE CRIM. PROC. art. 4.03 (1965). At that point appeal would lie directly to the United States Supreme Court. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1959).

Viewing the problem as one of judicial administration, the superior way to route this case is to provide for declaratory relief in the United States District Court. For under remedies (1) and (3), the United States Supreme Court is burdened with requests for direct review of municipal or trial court convictions from all parts of the country, without intervening appellate review decisions by any other courts. Yet the Supreme Court should act to review these cases if the ordinances are blatantly unconstitutional. On the other hand, if remedy (2) is followed, the case will probably never reach the Supreme Court, and the federal constitutional right will be mooted and will be unprotected, as outlined in part C, *supra*.

The appropriate routing here is to allow the United States District Court to review the constitutionality of the city ordinance under the Declaratory Judgment Act. A challenge to the Dallas City Ordinance is not a challenge to a Texas state statute. Accordingly, no misuse of federal judicial manpower will occur by convening a three-judge court, nor will the United States Supreme Court be burdened with yet another direct appeal. Nor are the state's interests seriously impaired. If a federal district court invalidates a city ordinance, the city council can quickly pass another ordinance drawn up constitutionally, whereas the time lag between the invalidation of a Texas statute, and the successful passage of another statute may be prolonged. Enlightened judicial administration would place the remedy in the federal District Court under the circumstances of this case.

CONCLUSION

The lower courts dismissed the instant case on the basis of *Becker* v. *Thompson, sub nom. Steffel* v. *Thompson, supra*, and certiorari has been granted therein. Even if *Steffel* is ultimately affirmed, the instant case calls for reversal because it has the following additional elements:

(1) The constitutional attack is on the face of the ordinance and not as applied;

(2) The threat of prosecution is greater because Petitioners have already been once convicted;

(3) The petitioners have been denied a writ of prohibition from the state's highest court;

(4) Affidavits were presented showing a pattern of state remedies inadequate to protect the federal constitutional rights.

For these reasons, a writ of certiorari should be granted to review the judgment of the Fifth Circuit.

Respectfully submitted,

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July 1973

APPENDIX

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1190

Summary Calendar*

TOM E. ELLIS and ROBERT D. LOVE,

Plaintiffs-Appellants,

versus

FRANK M. DYSON, Individually and in his capacity as Chief of Police of the City of Dallas, Texas, *et al.*, etc.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(April 16, 1973)

Before BELL, GODBOLD and INGRAHAM, *Circuit Judges.*

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

Opinion and Order of Dismissal of United States District Court, Northern District of Texas, Dallas Division

(Filed Dec. 13, 1972)

Tom E. Ellis and Robert D. Love, plaintiffs, filed this suit for redress of rights secured to them by the First and Fourteenth Amendments to the Constitution of the United States. This suit was instituted against certain officials of the City of Dallas, Texas, under 42 U.S.C. §1983.[1] Plaintiffs attack the constitutionality of an ordinance of the City of Dallas which prohibits loitering. They seek declaratory and injunctive relief.

The defendants moved the court to dismiss the case for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. Alternatively they moved the court in its discretion not take jurisdiction of this case by reason of the doctrine of abstention. The court overruled the defendants' motion to dismiss and carried the motion for abstention. In their answer defendants reurged that the complaint be dismissed. Subsequently, plaintiffs filed a motion for summary judgment.

The court has heard the arguments and considered the briefs of the parties in connection with the motion for summary judgment filed by plaintiffs and the motion for abstention filed by defendants. The court has also reconsidered the defendants' motion to dismiss which was previously denied. The court concludes that in the light of recent decisions of the Fifth Circuit hereinafter discussed the motion to dismiss should be granted.

[1] The city officials named as defendants are: Frank Dyson, chief of police; N. Alex Bickley, city attorney; Scott McDonald, city manager; Hugh Jones, clerk of the corporation court; Wes Wise, mayor.

In dismissing this case the court does not reach plaintiffs' motion for summary judgment or defendants' motion for abstention.

The complaint states that plaintiffs were arrested in the City of Dallas on January 18, 1972, and charged with violating an ordinance against loitering.[2] Plaintiffs applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent their prosecution under this ordinance. The gravamen of the application was the constitutionality of the ordinance under which plaintiffs were charged. This application was denied and the charges pending against the plaintiffs were set for trial in the corporation court of the City of Dallas. Plaintiffs moved to dismiss the charges on the ground that the ordinance was unconstitutional. This motion was denied and plaintiffs entered pleas of nolo contendere and were convicted.

In their complaint plaintiffs contend that this anti-loitering ordinance is unconstitutional "on its face" because it (1) is vague and overly broad, providing no discernible standards of conduct, and is violative of the due process clause; (2) is violative of the equal protection clause in that it depends upon the alarm or concern of a police officer as to whether the ordinance is being violated and this may vary from person to person; (3) prohibits conduct which

[2] The ordinance in dispute is Section 31-60 of the revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas. It provides in part "that no person shall loiter in, on or about any public or private place when his presence is accompanied by activity or is under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property in the surrounding area." It also defines loitering as including the activities of "walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions."

is beyond the power of a governmental authority to make illegal; and, (4) has a "chilling effect" upon the free exercise of the rights of freedom of association and assembly and freedom of speech guaranteed by the First Amendment and has a "chilling effect" upon the fundamental right of freedom of movement. Plaintiffs do not allege any bad faith prosecutions, harassment or other unusual conduct, or threat of such in the future, by any of the defendants that has caused or will cause them to suffer irreparable injury and harm unless the relief prayed for is granted.[3]

For the purpose of ruling on defendants' motion to dismiss this court has assumed as true every factual allegation in plaintiffs' complaint and also assumes that the City of Dallas will continue to enforce the ordinance and this may subject plaintiffs to future arrest and prosecution under the ordinance.

Since plaintiffs do not allege that there are pending criminal proceedings against them, this court is faced with the issue as to the propriety of granting federal declaratory and injunctive relief against possible future criminal prosecutions under an ordinance alleged to be unconstitutional on its face when there are no allegations in the complaint of bad faith prosecutions, harassment or other unusual circumstances which would cause plaintiffs to suffer irreparable injury and harm through the enforcement of the ordinance.

[3] In addition to asking this court to declare this ordinance unconstitutional, plaintiffs also ask the court to order all references to the arrests of the plaintiffs be "expunged" from police, FBI and court records and declare that if plaintiffs are ever asked if they have been arrested or convicted, they shall be entitled to answer in the negative insofar as the arrests and convictions arise from enforcement of this ordinance.

In *Younger* v. *Harris*, 401 U.S. 1 (1971), the Supreme Court laid to rest any question as to what was required for federal judicial relief in those instances where there was pending criminal prosecution by holding that such relief could not be granted except under extraordinary circumstances where the danger of irreparable injury was great and immediate. 401 U.S. at 45. The Court went on to hold that the existence of a "chilling effect" on First Amendment rights would not alone constitute a sufficient basis for prohibiting pending state action. However, the propriety of granting federal relief when no state criminal proceedings are pending was expressly reserved by the Supreme Court when it decided *Younger's* sibling *Samuels* v. *Mackle*, 401 U.S. 66 (1971). However, the Fifth Circuit in recent decisions has responded to this very issue.

In *Becker* v. *Thompson*, 459 F.2d 919 (5th Cir. 1972) the court held that the *Younger* principles applicable to pending state criminal prosecutions are also applicable in cases seeking federal equitable relief from threatened state criminal prosecution. Later decisions of the Circuit have followed this holding. *Reed* v. *Giarrusso*, 462 F.2d 706 (5th Cir. 1972).[4] *Milner* v. *Burson*, No. 71-2853 (5th Cir., December 6, 1972). The complaint in *Reed* alleged "harassment and unlawful arrest . . . done in utter bad faith." The court noted that "the complaint . . . makes allegations which if proved, would entitle them to relief even under the

[4] In *Reed* the court was initially concerned with the standing of the plaintiffs to bring the suit since this was the basis on which the district court had dismissed the complaint. The court concluded, as this court does in the case *sub judice*, that plaintiffs did have standing to sue since they had been arrested and alleged that they will continue to engage in the same conduct which brought about their arrests and that they fear future arrests and prosecutions.

stringent standards of *Younger*." *Reed*, 462 F.2d at 706, 711.

A reading of these cases leads the court to conclude that before federal declaratory or injunctive relief is available in the absence of a pending criminal prosecution there must be allegations of threatened bad faith prosecution, harassment or other unusual circumstances. In addition there must be an allegation of irreparable injury and harm to one seeking federal relief.

The only allegations in the complaint in this case which approach irreparable injury are the statements that the ordinance will have a "chilling effect" on the plaintiffs' First Amendment rights and their fundamental right of freedom of movement. The fact that the enforcement of this ordinance by the defendants would have such an effect is not enough to establish irreparable harm and injury. *Younger*, 401 U.S. at 51.

The court further notes that the plaintiffs have not alleged that they exhausted the state appeal processes after they were convicted in the corporation court. The plaintiffs could have appealed and obtained a trial de novo in the Dallas County, Criminal Court of Appeals. *Tex. Code Crim. Proc. Ann.* art. 44.17 (1965). Had they been convicted and fined in excess of $100.00, they could have appealed to the Texas Court of Criminal Appeals, the highest criminal appellate court in the State of Texas. *Tex. Code Crim. Proc. Ann.* art. 4.03 (1965). Had they been convicted and fined less than $100.00, plaintiffs would have exhausted their state remedies at that point.[5]

[5] At this stage plaintiffs had the right to appeal directly to the Supreme Court of the United States. 28 U.S.C. §1257.

For the reasons set forth above it is the opinion of the court that the defendants' motion to dismiss should be granted.

It is so ORDERED and this case is dismissed with all costs taxed against plaintiffs.

Dated this 13th day of December, 1972.

/s/ R. WM. HILL
United States District Judge

Revised Code of Civil and Criminal Ordinances of Dallas, Texas

"Section 31-60. *Loitering accompanied by activity or under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property—prohibited.*

It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well-being of persons or for the security of property, in the surrounding area.

For the purposes of this Section, the term *loiter* shall include the following activities: The walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; the idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions.

For the purposes of this Section, the term *any place,* public or private, shall include, but not be limited to, the following: All places commonly known as being distinctively public, such as public streets, public restrooms, sidewalks, parks, municipal airports, alleys and buildings; all places privately owned but open to the public generally, such as shopping centers, transportation terminals, retail stores, movie theatres, office buildings, and restaurants; and, all places distinctively private, such as homes or private residences and apartment houses.

For the purposes of this Section the term *surrounding area* shall be defined as follows: That area easily and immediately accessible to the person under observation.

Without limitation, the following activities and circumstances may be considered in determining probable cause for alarm or concern:

(a) The flight of a person upon the appearance of a Peace Officer or any other person;

(b) Attempted concealment by a person upon the appearance of a Peace Officer or any other person;

(c) The systematic checking by a person of doors, windows, or other means of access to buildings, houses or vehicles;

(d) Repeated activity by a person, continuous or broken, which outwardly manifests no purpose, such as going from one place to another and back with no showing of use for such movement;

(e) Continuous presence by a person in close proximity to any building, house, vehicle or any other property or to any other person, at any time, when the activity of such person manifests possible unlawful activity, such continuous presence being for an unreasonable period of time under the circumstances then existing;

(f) A change of direction by a person upon the appearance of a Peace Officer in order to avoid meeting or crossing paths with such Officer;

(g) If on private property, the continued refusal of a person to leave such private property when requested to do so by the owner, manager, proprietor, or lessee of such property."

SECTION 2. Any person in violation of this Ordinance shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than $200.00.

SECTION 3. That Chapter 31 and Chapter 32 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, save and except as amended herein, shall remain in full force and effect.

SECTION 4. The fact that Section 31-61 of Chapter 31 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, previously passed by the City Council of the City of Dallas has been declared to be unconstitutional and unenforceable in the Courts of this State, creates an urgency and an emergency in the preservation of the public peace and general welfare and requires that this Ordinance shall take effect immediately from and after its passage and final publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

N. ALEX BICKLEY, City Attorney

/s/ N. ALEX BICKLEY

Passed Jul 20 1970
Correctly Enrolled Jul 20 1970
N. ALEX WULK
City Attorney

ATTEST:
HAROLD G. SHANK
City Secretary.